(12)

No. 98-791

IN THE
Supreme Court of the United States

J. DANIEL KIMEL, JR., *et al.*,
Petitioners,

v.

FLORIDA BOARD OF REGENTS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF THE RESPONDENT

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Supreme Court of the United States
October Term, 1999

No. 98-0791

Daniel Kimel,
Petitioner,
v.
Florida Board of Regents,
Respondent,

On appeal from the
United States Court of Appeals
for the Eleventh Circuit

Brief Amicus Curiae of the Coalition for Local Sovereignty in support of the Respondent

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The Coalition for Local Sovereignty respectfully submits this brief as amicus curiae[1]. Letters of consent from both parties have been filed with the Clerk of the Court. The brief urges the reversal of the appeals court ruling and dismissal of suit against Florida, by reason of immunity.

Interest of the Amicus Curiae

CLS is a non-profit educational foundation, whose membership includes state and local officials from across the country. We

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[1] Counsel for the amicus and its director, Dr. Paul Clark, authored this brief. No other person other than the amicus or its counsel made a monetary contribution to the preparation or submission of the brief.

have no financial, or other direct interest in the case, other than desire to support self-government and the rule of law. CLS has, for several years, been in the forefront of advocating a restoration of the doctrine of legal immunity for state and local government in federal court.

STATEMENT OF THE CASE

The petitioner has brought suit against an agency of the State of Florida alleging age discrimination. Florida invoked its immunity under the Eleventh Amendment, but the Appeals court refused to acknowledge that immunity.

SUMMARY OF ARGUMENT

The US Supreme Court in recent cases has acknowledged the doctrine of sovereign immunity of States from prosecution in federal court. These decisions have led to a host of cases in which States have sought to invoke their immunity against a wide range of suits. A main question now before the Court is whether or not the Fourteenth Amendment somehow negates the Eleventh Amendment's guarantee of immunity of States from suit by individuals in federal court.

It is a fundamental rule of legal interpretation that one part of the Constitution cannot be taken to negate another part if both sections can be interpreted so that both have full force. It is entirely possible to take both the Eleventh Amendment and the Fourteenth Amendment at face value so that both will have effect. The prohibition on certain actions of States contained in Amendment 14 do not differ qualitatively from other prohibitions on States found in Article 1 section 10. If both Art 1 section 10 and Amendment 11 are not contradictory (which no one has ever suggested) then there is no reason to regard Eleven and Fourteen as in conflict. Hence both must be given full force. States may not be sued in federal court even for "civil rights" violations.

ARGUMENT

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to *ANY* suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Eleventh Amendment thus provides no exceptions to the immunity of States in federal court. Attempts to carve out exceptions are entirely beyond the text and history of the amendment, and of the Constitution as a whole.

At the time of ratification many anti-Federalists were concerned that the clause in the Constitution stating that federal courts would have jurisdiction in "suits between a State ... and foreign states, citizens or subjects" would allow suits against States by individuals in Federal court.

Hamilton and the Federalists argued that this jurisdiction was only one way, States could sue individuals in federal court, but individuals could not sue States. This is explained by Hamilton in Federalist 81:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. . . . there is no color to pretend that the State governments would, by the adoption of this [constitution], be divested of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. . . . To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of preexting right of

> the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted.

James Madison, made it equally clear that an individual could never sue a state in federal court. Madison declared at the Virginia ratifying convention, "controversies between a state and citizens of another state is much objected to, and perhaps without reason. *It is not in the power of individuals to call any state into court.* The only operation it can have is that, if a state should wish to bring a suit against a citizen" (3 Elliott, Debates, 533, also quoted in Hans v. Louisiana, emphasis added).

Despite Hamilton's and Madison's assurances, there was an opening for judicial attack upon state sovereignty. Almost immediately a case arose (*Chisholm v. Georgia* (1793)) in which a citizen of another State brought suit against Georgia and the suit was heard in federal court.

The majority opinion of the court adopted the anti-federalist reading, however, and said that the text of the Constitution made no such distinction as Hamilton had stated.

The minority opinion written by Justice Irendell, however, closely followed the analysis of Hamilton arguing that "A State is altogether exempt from the jurisdiction of the Courts of the United States, or from any other exterior authority, unless in the special instances where the general Government has power derived from the Constitution itself." A State retains all of its sovereignty unless there is "specific and explicit cession" of that sovereignty in the Constitution--and suits by individuals against States was not explicitly ceded by the States.

It should be noted that suits by individuals against their own States was never even imagined to be allowable. In summarizing the constitutional issue under discussion in the dispute Irendell noted:

> The Constitution, therefore, provides for the jurisdiction

> wherein a State is a party, in the following instances:--1st. Controversies between two or more States. 2nd. Controversies between a State and citizens of another State. 3d. Controversies between a State, and foreign States, citizens, or subjects. And it also provides, that in all cases in which a State shall be a party, the Supreme Court shall have original jurisdiction.[2]

This was obviously meant to be an inclusive list, and the question under dispute was whether or not the second category gave jurisdiction in all such suits or only to States suing individuals.

After the decision of the Court in Chisholm (which upheld the expansive anti-federalist reading of the Constitution) it was recognized that to preserve sovereignty it was necessary that all suits against a State be heard in the State court. As a result Congress quickly passed and the states ratified the Eleventh Amendment specifying that the nothing in the constitution could be construed to allow federal jurisdiction in suits against a State by citizens of any other state or country.

This closed the apparent loophole in the Constitution which made State action subject to federal jurisdiction through the suit of a non-citizen.[3] It should be obvious that the language of this amendment is extremely clear and not open to much interpretation: if a non-state-citizen files suit against a State such

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[2] The Court has also violated the protection afforded states that "in all cases in which a state shall be a party the Supreme Court shall have original jurisdiction." States are totally immune from suits in lower courts, but that is too broad to be addressed here.

[3] Although a state could be a defendant in federal court if one state filed suit against another, this is fairly rare, and since only another state and not an individual could initiate such action, the danger of federal intrusion is more remote.

a case is not subject to federal jurisdiction--at all.

The clarity of the amendment's language was immediately approved by the authority of the Court in equally plain language. In Hollandsworth v. Virginia, the plaintiff had argued that his suit against Virginia should go forward because it had been commenced prior to the adoption of the amendment. The Court's unanimous ruling leaves no doubt as to the absolute nature of the amendment, as it declared that "the amendment being constitutionally adopted, there could not be exercised *any jurisdiction*, in *any* case, past or future, in which a state was sued by citizens of another state." This makes as clear as can be that the Court did not believe there were any exceptions to the clear language of the amendment.

As to suits by its own citizens, the Court noted in Couer d'Alene v. Idaho: "the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction. As a consequence, suits invoking the federal question jurisdiction of Article III courts may also be barred by the Amendment." This question has now been definitively settled by Alden v. Maine, and College Savings Bank v. Florida (1999).

Over the last 80 years the court had attempted to create various exceptions to state immunity. At least one, the doctrine of implicit consent created in Parden v. Terminal Railroad, has now been officially scrapped. Others remain to be scrapped.

First is the fiction set out in Ex Parte Young, that an individual may sue individual State officers while the Court pretends that this is not a case against the State. The governor of Georgia was also named as a defendant in Chisholm. If the Eleventh Amendment is no bar to suits against government officials as individuals, Chisholm v. Georgia could still have proceeded under the Young fiction even had the Eleventh Amendment been in place. No honest person can seriously imagine that the framers of the Eleventh Amendment would have allowed such a thing. Since the Eleventh Amendment was

designed explicitly to overrule and to enshrine in Constitutional law for all time the dissenting opinion Justice Irendel, any interpretation of the Constitution which would allow Chisholm v. Georgia to be heard in federal court must run afoul of the Eleventh Amendment. The Young fiction is, of course, internally contradictory and ought to repudiated once and for all.

As Justice Harlan noted in his dissenting opinion:

> The suit was, as to the defendant Young, one against him as, and only because he was, Attorney General of Minnesota. No relief was sought against him individually but only in his capacity as Attorney General. And the manifest--indeed, the avowed and admitted--object of seeking such relief was to tie the hands of the [State]. It would therefore seem clear that within the true meaning of the Eleventh Amendment suit brought in the federal court was one, in legal effect, against the State (also cited with approval by the plurality in Coeur d'Alene v. Idaho).

The Court has already taken a step in this direction in Alden declaring that "Some suits against State officers are barred by the rule that sovereign immunity is not limited to suits which name a State officer as a party if the suits are, in fact, against the State."

Another exception suggested by some is that the Eleventh Amendment "does not bar certain actions against State officers for injunctive or declaratory relief." This is clearly contradictory of the Eleventh Amendment which bars all suits in law or equity. Injunctive relief is exactly the sort of thing covered by the courts of equity, and as such is expressly prohibited by the amendment.

The most important exception is that created by Fitzpatrick v. Bitzer in 1976 which said that Congress may nullify state immunity when it claims to be using is power of enforcing the Fourteenth Amendment. This is the primary objection and main issue in the current case. The court ought to

take this opportunity to overrule Fitzpatrick, just as it overruled Parden last term.

A majority in Fitzpatrick ruled that "We think that Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against a State or State officials which are constitutionally impermissible in other contexts."

As David Currie has written in a critique of Fitzpatrick, this reasoning could just as well be applied to any part of the Constitution. Currie notes: "This reasoning is less than overwhelming. One might have thought that subsec. 5 [of the Fourteenth Amendment], like other 'plenary grants of power, was subject to explicit and implicit constitutional limitations; one would hardly read it to empower Congress to authorize cruel and unusual punishment [for violators of the Fourteenth Amendment]."[4] In other words, if Congress now has power to overrule parts of the Constitution in order to protect constitutional rights which they claim to be protected by the Fourteenth Amendment, then they are able to proscribe cruel and unusual punishment or anything else they deem "appropriate" for such protection, even though explicitly prohibited by other parts of the Constitution.

The argument that the Fourteenth Amendment actually overrules the Eleventh, can only be based upon the claim that the two amendments are inherently contradictory.

It is a fundamental rule of interpretation that *we must give full effect to all parts of the Constitution unless one clause is clearly incompatible with and contradictory to another.* The Twenty-first amendment for example says that "The eighteenth article of amendment to the Constitution of the United States is

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[4] David Currie, *The Constitution in the Supreme Court* (Chicago: University of Chicago Press, 1990), 573.

hereby repealed." The Fourteenth Amendment contains no such provision. The Eleventh Amendment is quite explicit that "the Judicial power of the United States shall not be construed to extend to" private suits against States. That statement is not contradictory of anything in the Fourteenth Amendment.

The fact that courts tried to give full force to both amendments for over 100 years is strong evidence that Fitzpatrick was wrongly decided.

There is nothing incompatible with the Fourteenth Amendment prohibiting States from denying equal protection, and the Eleventh Amendment saying that if they do, it is not the role of the federal courts to make them.

As the plurality ruled in Ceour d'Alene v. Idaho "It would be error coupled with irony were we to bypass the Eleventh Amendment, which enacts a scheme solicitous of the States, on the sole rationale that state courts are inadequate to enforce and interpret federal rights in every case."

This point seems eminently clear from an analysis of the relation of Article 1 section 10 and the Eleventh Amendment. Article 1 section 10, of course, provides a list of things which States are prohibited from doing: passing a "bill of attainder, ex post facto law, or law abridging freedom of contract" and so forth. In 1798 the Eleventh Amendment is ratified, and sovereign immunity is unquestionably enshrined in the Constitution (at least with reference to non-citizens). Does the Eleventh Amendment overrule and supersede art 1 sec 10? Can a State now pass a bill of attainder confiscating the property of a citizen of another State?

No one has ever argued that the Eleventh Amendment overruled Art 1 sec 10. Even the most diehard apologist for State's rights would not make such an argument. The assertion is preposterous. Even the most alarmist of anti-federalists never imagined that Article 1 sec 10 could be used to nullify sovereign immunity: as Alden declared, "The [Eleventh] Amendment's language, furthermore, was directed toward Article III, the only

constitutional provision believed to call state sovereign immunity into question."

If a State in 1800 had attempted to make a law prohibited by Article 1, section 10, then it would have been unconstitutional, but any foreign citizen affected still would not have been able to bring suit against the State in federal court. He would need to bring suit in state court and demand that state judges rule the edict as a violation of the constitution. It is entirely reasonable (and indeed our federal system was long built on the assumption) that some rights granted by the federal constitution are binding on a State, but that it is the sole responsibility of state and local government to guarantee it.

This was precisely the ruling of the Court in Hans:

> That a state cannot be sued by a citizen of another state, or of a foreign state, on the mere ground that the case is one arising under the constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. Those were cases arising under the constitution of the United States, upon laws complained of as impairing the obligation of contracts. . . . It was not denied that they presented cases arising under the constitution; but, notwithstanding that, they were held to be prohibited by the [eleventh] amendment (Hans v. Louisiana).

In Couer d'Alene the plurality opinion declared that "Neither in theory or in practice has it been shown problematic to have federal claims resolved in State courts where 11th Amendment immunity would be applicable . . . Federal courts, after all, did not have general federal question jurisdiction until 1875."

If there is no necessary contradiction between Art 1 sec 10 and the Eleventh Amendment, as everyone will acknowledge, then there is also no reason to assume that there is a

contradiction between the Eleventh and the Fourteenth Amendments. The wording in I, 10 and in Amendment 14 is, after, all identical: "no State shall" do x, y, z. If there is no explicit contradiction then both parts must be given full force.

Chisholm noted that "A state retains all of its sovereignty unless there is specific and explicit cession of that sovereignty." Certainly there is no "specific and explicit cession" of sovereign immunity found in the Fourteenth Amendment. Any attempt to find one is by implication or drawing on various "penumbras and emanations," but it is certainly not explicit.

We may also cite Alden (citing Blatchford) which postulated that "Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design." By this standard there is no "compelling evidence" to suggest that the Fourteenth Amendment was meant to overrule sovereign immunity. Rather, precedents established by the Court in the 1880's and 1890's suggest that the Court regarded sovereign immunity as still fully in effect (Clark v. Barnard (1883) Hans v. Louisiana (1890), and Smith v. Reeves (1900).

Moreover, even if one accepts that the Fourteenth Amendment was designed to effect a "fundamental shift" in State/federal relations, the exact nature of that shift is still open to much debate. The assertion that denial of sovereign immunity was part of that shift is again based on nothing more than assumption and implication, and is contrary to all of the jurisprudence of the late 19th Century. To utterly nullify an entire article of the Constitution based on mere implication should not happen.

The Eleventh Amendment is "specific and explicit" about what the federal courts may not do. To overrule a specific and explicit prohibition by appeal to a mere guess and implication is contrary to every rule of legal interpretation. It is as if Congress were to enact a provision violating the explicit provisions of one

part of the constitution, while appealing to its "implied powers" as authority to do so. It would be the height of absurdity to imagine that Congress could set aside specific and explicit prohibitions based on an appeal to any "implied powers;" yet this is precisely what people do who argue that Congress may ignore the explicit prohibition in Amendment 11, based on an "implied power" found in Amendment 14.

To this effect we cite no less an authority on the subject than Alexander Hamilton, who in discussing sovereign immunity in Federalist 81, declared that "to ascribe to the federal courts, by mere implication, and in destruction of preexting right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarranted."

Whether or not age discrimination is a valid enforcement of the Fourteenth Amendment we do not address. We do not believe it is, but even if it were it would still not matter. The issue must be left to state tribunals and state citizens to decide.

Conclusion

In summary we cite the judgement of the Court in Alden which proclaimed

> "The principle of immunity from litigation assures the States and the nation from unanticipated intervention in the processes of government." (Great Northern Life Ins. Co v. Read) When the States' immunity from private suits is disregarded, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." (In re Ayers) While the States have relinquished their immunity from suit in some special contexts--at least as a practical matter--this surrender carries with it substantial costs to the autonomy, the

> decisionmaking ability, and the sovereign capacity of the States. ... If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen.

These are spectacular words. If indeed the issue in sovereign immunity is the very preservation of representative government, how can we begin to imagine carving out exceptions for suits against state officers, for injunctive or declaratory relief, or for cases which may arise under the Fourteenth Amendment? The autonomy, decsionmaking ability and sovereign capacity of the States, is threatened more directly by these types of suits as any seeking merely monetary damages.

Respectfully submitted,

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